(23)

No. 94-1837

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

v.

BILL NELSON, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA,
FLORIDA DEPARTMENT OF INSURANCE,
FLORIDA ASSOCIATION OF LIFE UNDERWRITERS,
PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC.,
AND FLORIDA ASSOCIATION OF INSURANCE AGENTS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY BRIEF

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27 pp

RULE 29.6 STATEMENT

A list of parent companies and wholly owned subsidiaries of the petitioner Barnett Bank of Marion County, N.A., is provided in the petition for writ of certiorari at page ii.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - CONTINUED

TABLE OF AUTHORITIES - CONTINUED

STATUTES:

TABLE OF AUTHORITIES - CONTINUED

OTHER AUTHORITIES:

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PETITIONER'S REPLY BRIEF

I.

THIS CASE INVOLVES ACTUAL CONFLICT BETWEEN FEDERAL AND STATE LAW

The briefs of both respondents and all five of their *amici* describe this case as one involving possible *pre-emption* of Fla. Stat. Ann. § 626.988 ("Section 626.988") by 12 U.S.C. § 92 ("Section 92"). "Pre-emption" substantially understates the relationship between the federal and state laws. Section 92 *conflicts* with Florida's law barring bank insurance sales.

The respondent Insurance Agents devote 15 pages of their brief (pp. 16-30) to arguing that "under traditional pre-emption analysis" Section 626.988 is not displaced. They discuss various general rules of pre-emption. But they ignore the central point of *conflict*. Federal law specifically authorizes national banks to do what Florida law forbids — sell insurance from small-town branches. The respondents claim there is no inconsistency because federal law merely grants a "power" to national banks and does not confer any "right" upon them (Insurance Agents Br. 26-29). This jurisprudential distinction conflicts with this Court's decisions in *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954), and *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982), which the respondents cannot distinguish.

Both *Franklin Nat'l Bank* and *De la Cuesta* involved far less direct conflict between federal and state law than exists here. The state law in *Franklin Nat'l Bank* did not prohibit national banks from doing what federal law authorized — "'to receive time and savings deposits and to pay interest on the same.'" 347 U.S. at 375. The law only prohibited a national bank from using the word "saving" or "savings" in promoting its business. Nonetheless, this Court held that the federal law was not only "declaratory" of a national bank's right to accept savings deposits, but that it also implicitly gave national banks the right to use the "commonly understood description" of that business in their advertising. This, said the Court, created "a *clear conflict* between the law of New York and the law of the Federal Government," which the Supremacy Clause resolved in favor of the latter. 347 U.S. at 378-79 (emphasis added).

Here, the dispute is not over the use of a term such as "insurance" in advertising. It is over the substantive right to enter the business of selling insurance. If the New York law in *Franklin Nat'l Bank* had not merely prohibited national banks from using the word "savings" but had prohibited them from accepting savings deposits, the *Franklin Nat'l Bank* case would

parallel this one. Had New York law imposed such a bar, it would, *a fortiori*, have been held to conflict with federal law.

In *De la Cuesta*, the federal statute did not even explicitly address the subject of the allegedly pre-empted state law. Under a general grant of statutory authority, a federal agency had authorized savings-and-loan associations to use loan provisions prohibited by California law. Applying the principle that "state law is nullified to the extent that it actually conflicts with federal law" (458 U.S. at 153), this Court held that if a federal regulation authorizes a contract term that state law forbids, there is "an *actual conflict* between federal and state law." 458 U.S. at 159 n. 14 (emphasis added).

It is inconsistent with *Franklin Nat'l Bank* and *De la Cuesta* to enforce a state law prohibiting banks from doing what federal law explicitly authorizes. The federal authorization necessarily conflicts with the State's prohibition. *See also Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256 (1985), which held that a state law restricting a county's spending of federal funds conflicted with a federal law stating that the county "may" expend funds for any purpose.[1]

Moreover, the language of Section 92 contradicts the notion that Congress merely conferred a "power" and left the ultimate "right" to sell insurance to the judgment of state authorities. Section 92 says that small-town national banks may

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[1] *Lawrence County* also holds that a federal agency charged with implementing a statute is entitled to considerable deference on the question whether the statute conflicts with state law. *See* 469 U.S. at 261. The Comptroller of the Currency does not administer the McCarran-Ferguson Act, so his views on that law may not be entitled to special deference. But on the question whether Section 92 itself empowers national banks to sell insurance regardless of state law, the Court should defer to the Comptroller's consistent construction. *See also Franklin Nat'l Bank, supra*, 347 U.S. at 377.

"act as the agent" for any insurance company "authorized" to issue policies by a State. Congress subjected the "right" of national banks only to "such rules and regulations as may be prescribed by the Comptroller of the Currency." Congress did *not* make a bank's "right" to sell insurance subject to regulation by the "authorities of the State." Section 92 thus requires (1) that the insurance company be authorized by the State, and (2) that the bank be authorized by the Comptroller. The respondents seek to add a level of authorization that Congress deliberately omitted — authorization by state regulators of the national bank's "right" to sell insurance.

Nor is *Massachusetts Medical Soc'y v. Dukakis*, 815 F.2d 790 (1st Cir.), *cert. denied*, 484 U.S. 896 (1987), comparable to this case. Congress did not explicitly authorize doctors to "balance bill," as Congress explicitly authorized national banks to sell insurance in Section 92. Indeed, then-Judge Breyer concluded that Congress evinced at most an intent "to leave existing fee-setting practices undisturbed." 815 F.2d at 794. It is one thing to hold that a federal law that fails to prohibit a practice does not pre-empt a state law's prohibition. It is quite another to argue that a federal law that explicitly authorizes a practice does not conflict with a state law that outlaws the very same practice.

The Insurance Agents' assertion that Section 92 reflects only a policy of "competitive equality" between national and state-chartered banks (Insurance Agents Br. 22), is even farther off the mark. The Insurance Agents rely on *First Nat'l Bank v. Dickinson*, 396 U.S. 122 (1969), but that case merely reveals the fallacy of their argument. The question in *Dickinson* was whether a Florida national bank could provide off-premises facilities for making deposits. Florida prohibited state-chartered banks from offering such services. This Court held that the McFadden Act, 12 U.S.C. § 36, which permits national banks to have branch offices *only to the extent state law permits state banks to do so*, barred the bank from offering these services.

The Court ruled that, as a matter of *federal* law, state branching restrictions applied to national banks. The Court stressed that "national banks are 'necessarily subject to the *paramount* authority of the United States.'" 396 U.S. at 134 (emphasis added) (quoting *First Nat'l Bank v. Missouri*, 263 U.S. 640, 656 (1924)). The Court explained that "while Congress has absolute authority over national banks, the federal statute has incorporated by reference the limitations which state law places on branch banking activities by state banks." 396 U.S. at 131. The Court's references to "competitive equality" between national and state banks referred only to the McFadden Act's express provisions ensuring that "neither system ha[s] advantages over the other *in the use of branch banking*." 396 U.S. at 131 (emphasis added); *see also First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

Unlike the McFadden Act, Section 92 does not employ the "mechanism of referring to state law," 396 U.S. at 133, with respect to the extent of national banks' power to sell insurance. The absence of any hint in the statute that the power to sell insurance is subject to state restriction is a telling sign that Congress intended no such limitation. *See Franklin Nat'l Bank*, 347 U.S. at 378 & n.7 ("We find no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances."); *Ramapo Bank v. Camp*, 425 F.2d 333, 344 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970). As Section 92 and the McFadden Act illustrate, when Congress intends to authorize state-law restrictions on national banks, it does so expressly. *See also, e.g., Missouri ex rel. Burnes Nat'l Bank v. Duncan*, 265 U.S. 17 (1924) (Holmes, J.).

Far from supporting respondents, *Dickinson* illustrates *our* point. Absent express recognition by Congress that state law limits national bank powers, state laws that would bar national banks from exercising powers granted by Congress either implicitly (as in *Franklin Nat'l Bank*) or expressly (as

here) conflict with federal law. National banks "'are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the [federal] Government may permit.'" *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 559 (1963) (quoting *Van Reed v. People's Nat'l Bank*, 198 U.S. 554 (1905)). When Congress authorizes national banks to enter a line of business, "[m]anifestly this exclude[s] the power of the state in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function . . . ." *First Nat'l Bank v. Fellows*, 244 U.S. 416, 425 (1917); *accord*, *Easton v. Iowa*, 188 U.S. 220, 229-38 (1903); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896); *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875). The only question here is whether the McCarran-Ferguson Act reverses the general rule and saves a state law that obviously conflicts with federal law.

II.

Invalidating Section 626.988 Will Not Disrupt Legitimate State Regulation

In seeking to make this Court believe that the sky will come falling down if the Court rules against them, respondents and their *amici* grossly exaggerate the effect of invalidating Section 626.988. They claim such a ruling will "eradicate well-established state regulation of insurance agents and their activities" (Insurance Agents Br. 13), "undermine the regulatory scheme for insurance agents in Florida and other States" (Nat'l Conf. of State Legislatures Br. 2), and "preempt the licensure of agents by the states" (Council of Insurance Agents Br. 4).

None of these cataclysmic consequences results from invalidation of Section 626.988 on the grounds we urge. If the Court agrees with us and the Sixth Circuit in the *Owensboro* case that a flat ban on insurance sales by banks is not a law enacted "for the purpose of regulating the business of insurance," such a decision will have no effect on *legitimate* and *bona fide* "well-established state regulation of insurance agents." Nor will it hinder legitimate and bona fide "licensure of insurance agents" or any other lawful part of "the regulatory scheme for insurance agents in Florida and other States." The only result of such a ruling will be to prevent the McCarran-Ferguson Act from being used to cloak local laws enacted to exclude competitors at the behest of the insurance-agents lobby.

Indeed, such a holding will legitimate and encourage local laws honestly aimed at preventing deception or coercion of insurance buyers. The Florida law presumes irrebuttably that banks deceive or coerce consumers and that banks must therefore be prevented from selling insurance. Striking down such a law does not affect laws prohibiting deceptive or coercive conduct by *all* insurance agents — whether or not employed by banks. Such laws may qualify for the shield granted by the McCarran-Ferguson Act to state laws enacted "for the purpose of regulating the business of insurance." But that is not the kind of law Florida chose to enact.

By the same token, invalidating Section 626.988 because Section 92 "specifically relates to the business of insurance" does not jeopardize a State's legitimate system of regulating insurance. Such a ruling only bars the State from disqualifying national banks *eo ipso* from selling insurance. Even-handed, across-the-board regulation continues to apply.

The Insurance Agents' contrary assertion rests largely on selective quotation from an interpretive letter of the Office of the Comptroller of the Currency addressing issues not here presented. The Insurance Agents maintain (Insurance Agents

Br. 13) that the Comptroller has opined that States may not require bank employees who sell insurance to be licensed. Their truncated quotation is misleading. The OCC letter says: "Regardless of the form or subject of a regulatory scheme, a state 'cannot demand that a national bank *or its employees* be licensed *to conduct . . . activities allowed by . . . 12 U.S.C. 24(7)*." OCC Interp. Ltr. No. 475 [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,012, at 71,119 (March 22, 1989) (first emphasis in original; second emphasis added). The "activities allowed" by 12 U.S.C. § 24 (Seventh) are those that are at the core of the business of banking. The letter the Insurance Agents quote stands only for the unexceptional proposition that a national bank need not be licensed by a State to carry out its *banking* functions. The letter does not address whether nondiscriminatory license requirements apply to bank employees engaged in insurance sales authorized by Section 92.

The vice of Section 626.988 that the respondents and their *amici* ignore is that instead of regulating pernicious conduct, it singles out "financial institutions" and disqualifies them, regardless of actual conduct, from selling insurance. A decision that such a legislative decision to throw out the baby with the bath-water will not be accepted as bona fide "regulation" of the business of insurance would not affect legitimate local regulation of that business.

III.

The Content and Preamble of Section 626.988 Show that Its True Purpose Is to Suppress Competition, Not To Regulate Insurance

The respondents and their *amici* have imaginatively conceived scenarios in which banks deceive or coerce naive and powerless purchasers of insurance. They have even portrayed

banks as such potentially influential vendors of insurance that they force insurance companies to endanger their own solvency. They ask this Court to believe that these potential harms led the legislature to "regulate the business of insurance" by automatically disqualifying virtually all "financial institutions" from selling insurance.

The short answer is that if Florida's legislature had indeed wanted "to avoid unfair trade practices, coercion, and undue concentration of resources" — as the Florida Insurance Commissioner claims in his brief (pp. 16-26) — it could have enacted or strengthened laws directed at such *conduct*. Section 626.988 is not directed at these alleged evils. Rather, it singles out "financial institutions" and excludes them from the ranks of those who may sell insurance in Florida.

Other Florida laws are directed at the conduct that the respondents cite as justifying the sweeping ban of Section 626.988. *See, e.g.*, Fla. Stat. Ann. §§ 626.9541, 626.7451, 626.7491, 626.88, 628.801. The two Florida insurance officials on whose challenged testimony the respondents rely acknowledged that these general laws would continue to apply to anyone who sells insurance in Florida, including employees of banks, even if Section 626.988 is held invalid. *See* Tr. 48-50, 96. The blanket prohibition applicable to all banks is, therefore, not a necessary or legitimate form of "regulation."

State regulatory regimes that govern how insurance agents interact with policyholders may by protected by the McCarran-Ferguson Act. *Cf. FTC v. National Casualty Co.*, 357 U.S. 560, 564 (1958) (per curiam). But the Florida law at issue here does not address the conduct of agents in soliciting, negotiating, or selling insurance. Section 626.988 does not refer to misrepresentation, false advertising, unfair discrimination, rebating, twisting, illegal dealings in premiums, or any of the other practices that are catalogued in Fla. Stat.

Ann. § 626.9541 — the Florida law that defines unfair or deceptive practices with respect to insurance.

Rather, as the Insurance Agents concede, Section 626.988 controls "affiliation" between insurance agents and banks. *See* Insurance Agents Br. i. The obvious effect of Section 626.988 is *not* to control the "point of sale" of insurance, but to preclude banks from acquiring revenue from insurance sales by prohibiting them from establishing a business relationship with insurance agents. If anything is clear from this Court's McCarran-Ferguson Act precedents it is that financial arrangements between insurers and third parties are not part of the "business of insurance" as the McCarran-Ferguson Act uses the term. *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 131-32 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 215-17 (1979).

Respondents rely on an intermediate Florida appellate court's statement that the legislature determined "that there is potential for abuse inherent in financial institutions being involved in the sale of insurance" (*Production Credit Ass'ns v. Department of Ins.*, 356 So.2d 31, 32 (Fla. Dist. Ct. App. 1978)), and on the same court's holding that Section 626.988 is constitutional because "rationally related to legitimate state goals" (*Glendale Fed. Sav. & Loan Ass'n v. Department of Ins.*, 587 So.2d 534, 536 (Fla. Dist. Ct. App. 1991), *review denied*, 599 So.2d 656 (Fla. 1992)). But the finding that Section 626.988 is not unconstitutional does not mean that it regulates the business of insurance under the McCarran-Ferguson Act. And the court's conclusion in *Glendale* that "a legislature could well have decided that *some* protection was required" (587 So.2d at 536; emphasis added) does not mean that a total ban on insurance sales by "financial institutions" is a permissible regulation of the business of insurance within the meaning of the Act. *Some* protection could have been provided in many other ways. Excluding banks altogether was patently

prompted by motives other than protection of consumers or regulation of the insurer-policyholder relationship.

The *first* of the reasons stated in the preamble to Section 626.988 when it was introduced in the Florida legislature was (Brief for the Petitioner 6a):

> [T]he entry of large banking institutions into the insurance agency business in areas where the banks have a large concentration of resources would result in the demise of small insurance agencies or their transformation into large combinations. This would decrease competition within the insurance industry and reduce the opportunity for youths, veterans and women to gain a foothold in a business in which ultimately they could participate as owners or managers.

The anti-competitive purpose of Section 626.988 could not be stated more succinctly. The legislature was not concerned with "regulating" sellers of insurance to protect the insurance-buying public. It was concerned primarily with "the demise of small insurance agencies" and fears of reduced "opportunity" for individuals as insurance agents. That is not the kind of legislation that the McCarran-Ferguson Act protects.

This Court's decision in *Michael M. v. Superior Court*, 450 U.S. 464 (1981), on which the respondents and their *amici* rely heavily (Insurance Agents Br. 36, Stephens Br. 9, n.9; Nat'l Conf. of State Leg. Br. 9, n.5), does not require this Court to accept the after-the-fact justification for Section 626.988 proffered by the respondents. The plurality in *Michael M.* recognized that in determining the constitutionality of a law, "the search for the 'actual' or 'primary' purpose of a statute is likely to be elusive" (450 U.S. at 469-70). In exercising the sensitive power to invalidate state statutes, the plurality gave "great deference" to a statutory justification offered by a State

and accepted by its highest court (450 U.S. at 470). Such deference is not required when the issue is a statutory one — whether a local law should be shielded from pre-emption because a federal statute protects local laws having a defined "purpose." In that distinguishable context, a court has a statutory obligation to determine the true purpose of the local law and not to defer to improbable explanations that a State may propose in order to save its laws from pre-emption. In any event, *Michael M.* does not remotely authorize respondents' request that the Court rely on *post hoc* testimony asserting hidden purposes to protect the rights of potential policyholders.

Nor are these newly discovered "purposes" valid. Respondents suggest two aims of the Florida statute: *First*, the law allegedly protects insurer solvency by preventing banks from becoming "super agents" who would force independent agents out of business, gain control over the insurance industry, and pressure insurers to make bad underwriting decisions that would lead to financial ruin. *Second*, respondents contend that Section 626.988 prevents banks from unlawfully forcing bank customers to meet their insurance needs through bank-affiliated rather than independent agents. Respondents say these "purposes" show that Section 626.988 has the "end, intention or aim" of protecting policyholders. Respondents err.

There is no indication in the law's history that Section 626.988 was enacted to protect policyholders at all. The only "evidence" offered at trial was the testimony of the Insurance Department's own lawyers about what they believed to be the law's purposes. The use of such testimony has been "compellingly criticized," particularly when "generated in the course of litigation . . . , for it may be designed to mislead, to put an advocate's slant on things." *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1438-39 (7th Cir. 1988); *cf. Quern v. Mandley*, 436 U.S. 725, 736 n. 10 (1978). The language and legislative history of Section 626.988 do not mention insurance-

company solvency, reliability of policies, or the desire to protect policyholders. *See* Brief for the Petitioner 5a-10a.

The fourth of six legislative concerns mentioned in the preamble to Section 626.988 was the possibility that banks might "tie" loans to the borrower's purchase of insurance. This concern is not with the insurer-policyholder relationship, but the relationship between banks and their customers. Moreover, the legislature's purported concern does not, as the Insurance Agents contend, reflect a determination by the Florida legislature that banks "will induce Florida residents to purchase insurance from the bank that is not needed by or suited to the customer." Insurance Agents Br. 39.[2] Indeed, given the legislature's expressed desire to protect independent agents from competition, it is far more likely that the statement about "voluntary tieing" indicates the legislature's concern that bank customers would fill their insurance needs by using bank-affiliated agents instead of independent insurance agents. *See* Stephens Br. at 13. The desire to protect independent insurance agents from bank competition is not a concern protected by the McCarran-Ferguson Act.

Florida's Insurance Commissioner has "lodged" with the Court a recommended order in an administrative proceeding titled *Department of Ins. v. James Mitchell & Co.* The determinations of the hearing officer in that case are irrelevant to any issue before the Court. That matter concerns allegations that variable annuities were misrepresented to be "bank products." Annuity sales are not governed by Section 626.988, and we do not understand the respondents to contend that a

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[2] Respondents profess concern that banks might sell insurance that customers do not need because banks are motivated by "profit." Insurance Agents Br. 39-40; Insurance Comm'r Br. 32. Is one to presume that insurance agents sell insurance only for eleemosynary reasons and never suggest the purchase of unneeded insurance?

purpose of Section 626.988 is to prevent policyholders from being deceived into thinking that life, fire, or other insurance policies, issued by a licensed insurance company, are "bank products." The allegations of misconduct in the *James Mitchell* case shed no light on the purposes of Section 626.988. Indeed, the trial court determined that the allegations in the *James Mitchell* matter were inadmissible for just this reason. *See* Tr. at 59-62, 83-89). We are surprised that the Department has placed this inadmissible and irrelevant material before this Court. It betrays the desperation of the respondents.

IV.

THE FLORIDA STATUTE IS NOT A CONVENTIONAL LICENSING OR REGULATORY MEASURE

The Insurance Agents contend that Section 626.988 is an insurance "licensing law," and they suggest that all such laws fall within the scope of the McCarran-Ferguson Act. *See* Insurance Agents Br. 32-38. The Insurance Agents fail to recognize the crucial distinction between licensing schemes designed to protect policyholders and laws like Section 626.988 that serve other purposes.

State licensing laws that aim to protect policyholders by enforcing professional standards of conduct for insurance agents may be protected by the McCarran-Ferguson Act. *Cf. Robertson v. California*, 328 U.S. 440 (1946). But laws that withhold, suspend or revoke licenses for reasons unrelated to the reliability or performance of the contract of insurance are not enacted for the purpose of regulating the business of insurance. *Cf. SEC v. National Sec., Inc.*, 393 U.S. 453, 458-60 (1969). The mere fact that Section 626.988 uses the State's licensing mechanism to prohibit banks selling insurance agents does not make it regulation of the business of insurance.

Section 626.988 is not like any of the "licensing laws" cited by the Insurance Agents and their *amici*. Licensing laws that monitor agents' education, competence, and trustworthiness, as well as the reliability of the contracts of insurance that they sell, may be said to protect policyholders. *See* Insurance Agents Br. 33, n. 24; Council of Ins. Agents and Brokers Br. 6; Stephens Br. 21-22; *see also Robertson v. California*, *supra*, 328 U.S. 449 (rejecting a Commerce Clause challenge to California's agent licensing system because it was "designed appropriately to secure the public from those evils of uncontrolled insurance solicitation to which it is directed"). Florida has enacted an entire system of such regulations, establishing procedures and requirements for the licensing of agents. *See* Fla. Stat. Ann. §§ 626.011 - 626.726.

Section 626.988, by contrast, does not prevent "uncontrolled insurance solicitation." It does not prevent banks from selling "worthless" policies to unsuspecting customers. Unlike other provisions of Florida law, it does not require minimal skills and education, or disqualify agents on the basis of character. It does not qualify as a "licensing" law in any traditional sense of the term, and it certainly bears no resemblance to the laws that this Court read in *National Securities* and *Fabe* as regulating the business of insurance.

Finally, standard authorities on insurance do not include total disqualification of banks from selling insurance as a customary form of "regulation." In Keeton & Widiss, *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* §§ 8.2(a), 8.2(b), at 938-41 (1988), the usual goals of insurance regulation are described, together with the forms insurance regulation ordinarily takes. Although the treatise — quoted extensively by the National Conference of State Legislatures at pp. 13-14 of their brief — describes "tie-in transactions" as a "troublesome area," it does not suggest that exclusion of banks from selling insurance is a permissible form of "regulation." *See id.* at 941.

Nor do the cases cited by the Insurance Agents establish that blanket prohibitions are "regulation" under the McCarran-Ferguson Act. *See* Insurance Agents Br. 38. Those authorities hold that prohibitory police-power legislation is not constitutionally forbidden. *See, e.g.*, *Ferguson v. Skrupa*, 372 U.S. 726 (1963). They by no means suggest that such prohibitions are "regulation" within the meaning of the McCarran-Ferguson Act. *Cf. Robertson*, *supra*, 328 U.S. at 449 (distinguishing "regulatory" from "exclusory" legislation).

V.

BECAUSE SECTION 92 EXPLICITLY REFERS TO INSURANCE SALES, IT "SPECIFICALLY" RELATES TO THE BUSINESS OF INSURANCE

The respondents and their *amici* acknowledge — as they must — that Section 92 "relates" to insurance. They argue, however, that it does not do so *specifically*. "Specifically," they claim, means a federal law must "either expressly direct displacement of state law or control directly some aspect of the 'business of insurance' the regulation of which is otherwise expressly delegated to the States." Insurance Agents Br. 42. *See also* Insurance Comm'r Br. 37 ("the federal law must 'specifically relate' with enough preemptive horsepower to displace the state law").

But the word "specifically" has a much clearer and more definite meaning. It means that the federal law must *explicitly* refer to the business of insurance, not just include insurance in some more general statutory term. *Black's Law Dictionary* (6th ed. 1990), for example, defines "specifically" as follows: "In a specific manner; explicitly, particularly, definitely." *Webster's Third New International Dictionary (Unabridged)* (1971) offers "explicit" as a synonym for

"specific" and defines "specific" as, *inter alia*, "characterized by precise formulation or accurate restriction (as in stating, describing, defining, reserving): free from such ambiguity as results from a careless lack of precision or from omission of pertinent matter."

If Section 92 only gave small-town national banks general authority to engage in "commercial services" and the issue was whether the statute "specifically related" to insurance because the sale of insurance was included within the term "commercial services," the modifier "specifically" might dictate a negative answer. But if the federal law explicitly and definitely specifies "insurance" as its subject matter — as Section 92 does *five* times — it is plainly a law that "*specifically* relates to the business of insurance."

Respondents' attempts to evade the statutory language are inventive but vain. Citing *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), respondents argue that to pre-empt state law under the McCarran-Ferguson Act, a federal statute must not merely "specifically relate" to the business of insurance, but must specifically *state* that pre-emption is intended. *Fabe*, of course, holds no such thing. The meaning of "specifically relates" in the McCarran-Ferguson Act was not even at issue in *Fabe*. The language on which respondents pin their hopes — *i.e.*, the Court's statement that the McCarran-Ferguson Act creates "what is, in effect, a clear-statement rule" under which there is no pre-emption "unless a federal statute specifically requires otherwise" (113 S. Ct. at 2211) — is simply a generalized description of the effect of the Act, not an attempt to prescribe a legal standard (let alone a legal standard that disregards the clear language of the Act). We do not take issue with the Court's language in *Fabe*. We merely point out that under the Act, pre-emption is "specifically required" (to use *Fabe*'s terms) when a federal law "specifically relates to the business of insurance" (to use the terms of the Act). No express statement of pre-emptive intent is required.

Any other reading would do violence to the words of the statute, and would, in effect, revive different language that was proposed but ultimately not enacted. *See* Brief for the Petitioner 44-45. The Insurance Agents suggest that the statute be read as if the proposed language (under which state law would yield to a federal statute only if the federal law "specifically so provides") *had* been enacted. Insurance Agents Br. 42, n.33. The reason offered for this unorthodox approach is the speculation that the original language was rejected because of its awkward syntax.[3] Respondents offer no support for the novel proposition that obvious substantive differences between proposed and enacted statutory language should be overlooked whenever the original language was "cumbersome." The use of awkward phrases in statutory drafting is so ubiquitous that respondents' proposed canon would leave the meaning of few laws unaltered.

Respondents also argue that a law may specifically relate to only one subject. Insurance Comm'r Br. 45. They therefore assert that Section 92, which they say relates to "bank income," cannot relate to insurance. Respondents support their dubious premise with neither precedent nor logic. Statutes, like other writings, may specifically relate to any number of subjects. This Court's own rulings demonstrate the fallacy of respondents' reasoning. ERISA, which the Court described as a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employment benefit plans" in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983), was also held to "specifically relate" to the business of insurance in

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[3] The supposed "awkwardness" the Insurance Agents believe Congress was striving to avoid was the placement of a phrase beginning with "Provided" immediately after a semicolon following the word "provides." Such constructions appear elsewhere in the United States Code (*e.g.*, 16 U.S.C. § 590y; 26 U.S.C. § 420(c)(3)(A)). There is no reason to suppose Congress would have been averse to using such language had it captured Congress' intent.

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517 (1993).

In a similar vein, respondents claim Section 92 does not "specifically relate" to the business of insurance because it was enacted "for the purpose of regulating" banks, not insurance. No doubt Section 92 (like Section 626.988) regulates banks. But the second prong of the McCarran-Ferguson test, unlike the first, does not turn on whether a statute was "enacted for the purpose of regulating the business of insurance." The federal law's "purpose" is not the issue. The law need only "relate" to the business of insurance, and do so "specifically." Section 92 passes that test regardless of whether its purpose is said to be regulation of banks, regulation of insurance sales, regulation of insurance sales by banks, or anything else.

Finally, respondents point out that the McCarran-Ferguson Act requires that the federal law specifically relate not just to "insurance," but to the "business of insurance." They correctly observe that there is a difference. And they argue that a federal law may mention "insurance" but still not relate to the "business of insurance." These truisms get respondents nowhere. Respondents themselves argue that Florida's law preventing banks from selling insurance regulates the "business of insurance" because the "point of sale" is an essential part of that business. If respondents are wrong on this point, they lose the case because the Florida law is not "enacted for the purpose of regulating the business of insurance." If they are right, they lose anyway, because a federal law that explicitly authorizes national banks to participate at the "point of sale" of insurance must, by respondents' own reasoning, relate (and relate specifically) not just to "insurance," but to the "business of insurance." Respondents have no way out of this dilemma.

CONCLUSION

For the foregoing reasons and those in our principal brief, the Court should reverse the judgment of the court of appeals and remand for entry of final declaratory and injunctive relief in favor of Barnett Bank on the question whether 12 U.S.C. § 92 pre-empts Fla. Stat. Ann. § 626.988.

Respectfully submitted,

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